

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT MEEKER, *et al.*,

Plaintiffs,

v.

STARFISH CHILDREN’S SERVICES, *et al.*,

Defendants.

CASE NO. C17-0376-JCC

ORDER

This matter comes before the Court on the parties’ joint Local Civil Rule 37 submissions (Dkt. Nos. 54, 65). The Court has thoroughly considered the parties’ briefing and the relevant record, and hereby ORDERS that:

I. BACKGROUND

The Court has previously set forth the facts of this case, and will not repeat them here. (*See* Dkt. Nos. 32, 76.) Since beginning discovery, a series of discovery disputes have arisen. (*See* Dkt. Nos. 54, 65.) On March 25, 2019, in accordance with Local Civil Rule 37, the parties filed their first joint motion for discovery (“LCR 37 Submission No. 1”), which included two discovery disputes. (Dkt. No. 54.) Justifying the Court’s faith in the parties’ ability to resolve discovery disputes without judicial intervention, the parties have since resolved one of these two disputes. (Dkt. No. 75.) The remaining issue in LCR 37 Submission No. 1 is whether Plaintiffs’ adopted children’s medical records (besides C.M.’s, the adopted child at issue in this litigation)

1 are discoverable. (*See* Dkt. No. 54.)

2 On April 18, 2019, the parties filed their second joint motion for discovery (“LCR 37
3 Submission No. 2”). (Dkt. No. 65.) LCR Submission No. 2 asks the Court to determine whether
4 28 different privilege log entries asserted by Defendant Michael Bosmann are indeed subject to
5 either the attorney-client privilege or the work product doctrine. (*See id.*) Plaintiffs assert that the
6 privilege log entries are ripe for *in camera* review. (*See id.*)

7 **II. DISCUSSION**

8 **A. Motions to Compel Discovery**

9 Discovery motions are strongly disfavored. “Parties may obtain discovery regarding any
10 nonprivileged matter that is relevant to any party’s claim or defense and proportional to the
11 needs of the case” Fed. R. Civ. P. 26(b)(1). In addressing the proportionality of discovery,
12 the Court considers “the importance of the issues at stake in the action, the amount in
13 controversy, the parties’ relative access to relevant information, the parties’ resources, the
14 importance of the discovery in resolving the issues, and whether the burden or expense of the
15 proposed discovery outweighs its likely benefit.” *Id.* The Court has broad discretion to decide
16 whether to compel discovery. *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d
17 1206, 1211 (9th Cir. 2002).

18 **B. LCR 37 Submission No. 1**

19 In the parties’ first joint submission, Defendant Bosmann seeks the medical records of
20 Plaintiffs’ adopted children other than C.M. (Dkt. No. 54 at 13–15.) Defendant Bosmann asserts
21 that these records are relevant for two reasons: (1) the records may refute Plaintiffs’ assertion
22 that they are unable to provide adequate care for C.M. because they may show that Plaintiffs’
23 other children suffer from equally or more severe medical conditions; and (2) the records may
24 shed light on the amount of damages actually suffered by Plaintiffs (for example, if Plaintiffs’
25 other adopted children’s conditions have contributed to Plaintiffs’ claimed damages). (*Id.*)
26 Plaintiffs oppose the production of the medical records because: (1) the request invades the

1 privacy of them and their other adopted children; and (2) Defendant Bosmann may obtain the
2 information he seeks through less intrusive means. (*Id.* at 15–18.)

3 The Court is mindful of the extremely sensitive nature of the medical records of
4 Plaintiffs’ other adopted children. However, some of their medical history is relevant to whether
5 Plaintiffs have the ability to properly care for C.M. This is because if Plaintiffs are able to care
6 for equally or more severe medical conditions of their other children, they may be more capable
7 of caring for C.M. than they indicate.

8 Keeping in mind the sensitive nature of the children’s full medical files, the Court
9 ORDERS Plaintiffs to produce, whether in the form of deposition testimony or a response to an
10 interrogatory, the following information about each of Plaintiffs’ other adopted children: (1)
11 medical diagnoses (except mental health diagnoses); (2) treatments related to the aforementioned
12 diagnoses; (3) prognoses; (4) a typical week of care for each child (including schedule and cost);
13 and (5) any special care each child needs over the course of a longer period of time (including
14 schedule and cost). In order to protect the confidential nature of this information, the parties are
15 ORDERED to submit a revised stipulated protective order that covers the medical history and
16 information for each of Plaintiffs’ adopted children other than C.M., no later than 14 days from
17 the entry of this order. Plaintiffs shall comply with this order no later than 14 days after the Court
18 enters the stipulated protective order.

19 **C. LCR 37 Submission No. 2**

20 In the parties’ second joint submission, Plaintiffs seek *in camera* review of numerous
21 documents in Defendant Bosmann’s privilege log that he argues are either subject to the
22 attorney-client privilege or the work product doctrine. (Dkt. No. 65.)

23 **1. Attorney-Client Privilege**

24 Defendant Bosmann’s privilege log indicates that Privilege Log Entries 6, 21, 30, 31, and
25 33–42 are protected by the attorney-client privilege. (*See* Dkt. No. 65-1 at 6, 12, 16–18.) “A
26 party claiming that otherwise discoverable information is exempt from discovery on grounds of

1 the attorney-client privilege carries the burden of establishing entitlement to the privilege.”
2 *Newman v. Highland Sch. Dist. No. 203*, 381 P.3d 1188, 1191 (Wash. 2016). “An attorney or
3 counselor shall not, without the consent of his or her client, be examined as to any
4 communication made by the client to him or her, or his or her advice given thereon in the course
5 of professional employment.” Wash. Rev. Code § 5.60.060(2)(a). “The attorney-client privilege
6 applies to communications and advice between an attorney and client and extends to documents
7 which contain a privileged communication.” *Pappas v. Holloway*, 787 P.2d 30, 34 (Wash. 1990).

8 The privilege extends to corporate clients. *Newman*, 381 P.3d at 1191 (citing *Upjohn v.*
9 *United States*, 449 U.S. 338, 396 (1981)). In the corporate context, the privilege applies to
10 communications between counsel and corporate employees regarding matters within the scope of
11 their corporate duties, supplied for the purpose of obtaining legal advice for the corporation, and
12 treated in a confidential matter. *Upjohn*, 449 U.S. at 394–95. Confidential conversations between
13 counsel and members of the top management of a corporation are covered by the attorney-client
14 privilege, as top management is empowered to act on behalf of the corporation. *Commodity*
15 *Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348 (1985). Additionally, confidential
16 conversations with mid-level or lower-level employees may be covered by the attorney-client
17 privilege if those employees possess information needed by counsel in order to give well-
18 informed legal advice, or if those employees are the people acting on counsel’s legal advice. *See*
19 *Upjohn*, 449 U.S. at 390–91. “[W]aiver may occur when the communication is made in the
20 presence of third persons” that do not include those listed above. *See Dietz v. Doe*, 935 P.2d 611,
21 619 (Wash. 1997).

22 *i. Privilege Log Entries 6 and 21*

23 Plaintiffs assert that the attorney-client privilege is inapplicable to Privilege Log Entries 6
24 and 21 because the confidential communications were discussed with third parties, thus waiving
25 the privilege. (Dkt. No. 65 at 13–14.) Although it is not completely clear who these third parties
26 are, they include at least some Starfish board members and some employees of Starfish. (Dkt.

Nos. 65-1 at 6–12, 65-2 at 3.) Discussion with fellow Starfish board members does not waive the privilege because such discussion is only fully informing the client, Starfish, about counsel’s advice. (*Id.*) However, discussion with mid-level and lower-level employees may waive the privilege, depending on whether those employees possess information needed by counsel or are acting on counsel’s legal advice. *See Upjohn*, 449 U.S. at 390–91.¹ Because Defendant Bosmann has not met his burden in establishing that Jet Tjarks and Scarlett Huang were necessary to the email exchange in Privilege Log Entry 6, Defendant Bosmann is ORDERED to produce Privilege Log Entry 6 for *in camera* review. To the extent any mid-level or lower-level employees were included on the email in Privilege Log Entry 21, Defendant Bosmann is ORDERED to produce that entry for *in camera* inspection as well.

ii. Privilege Log Entries 30, 31, and 33–42

The thrust of Plaintiffs’ argument with respect to Privilege Log Entries 30, 31, and 33–42 is that Defendant Bosmann has not met his burden of establishing that Michael Chen’s (one of Starfish’s previous attorneys) communications were legal in nature and, even if he has, that the crime-fraud exception to the privilege applies. (Dkt. No. 65 at 3–7.)

Only legal advice—not business advice—is covered by the attorney-client privilege. *See Kammerer v. W. Gear Corp.*, 635 P.2d 708, 711 (Wash. 1981). Although it is unclear from the face of the privilege log what type of advice Mr. Chen is providing in Privilege Log Entries 30, 31, and 33–42, Defendant Bosmann supplemented those privilege log entries with his counsel’s declaration, which contained more detailed information.² (*See* Dkt. No. 65-2.) The declaration

¹ Defendant Bosmann also alleges that the attorney-client privilege is not waived because some of the authors and recipients on the emails in Privilege Log Entries 6 and 21 were individual defendants in a separate, similar lawsuit filed in New York. (Dkt. Nos. 65 at 18, 65-1 at 6–12, 65-2 at 3.) Discussion with other individual defendants in the New York litigation does not waive the privilege because those individual defendants are each entitled to that advice as well.

² Evidence about whether the attorney-client privilege or the work product doctrine are properly invoked by Defendant Bosmann in his privilege log is gleaned from the privilege log itself and his counsel’s declaration. *See, e.g., Apple Inc. v. Samsung Elecs. Co.*, 306 F.R.D. 234, 237 (N.D. Cal. 2015).

1 makes clear that some of the entries contain legal advice, while others may not. Entries 30, 40,
2 and 42 all clearly relate to legal advice because they concern employee insurance and benefits
3 and the visa application process. (Dkt. No. 65-2 at 2–3.) However, the remainder of the entries
4 may not necessarily contain legal advice, but may instead contain business advice. (*See id.*)
5 Therefore, Defendant Bosmann is ORDERED to produce Privilege Log Entries 31, 33–39, and
6 41 for *in camera* review.³

7 The attorney-client privilege “does not extend to communications in which the client
8 seeks advice to aid him in carrying out an illegal or fraudulent scheme,” including the
9 perpetration of a civil fraud. *Whetstone v. Olson*, 732 P.2d 159, 160 (Wash. Ct. App. 1986). This
10 exception applies “only when the client knows, or reasonably should know, that the advice is
11 sought for a wrongful purpose.” *Id.* at 161. An *in camera* inspection is not warranted if a bare
12 allegation of fraud is asserted; rather, *in camera* inspection is only appropriate “upon a showing
13 of a factual basis adequate to support a good faith belief by a reasonable person that wrongful
14 conduct sufficient to invoke the . . . exception . . . has occurred.” *Id.* at 311–12. The party
15 asserting the exception’s applicability has the burden of establishing its elements. *Id.* Plaintiffs
16 have not met this burden. They rely on bare allegations of fraud to assert that the exception is
17 applicable—specifically, they rely on the complaint and Naomi Kerwin’s conclusory and
18 speculative declaration that fraud abounds. (*See* Dkt. No. 65 at 6–7, 10–11.) Therefore, the Court
19 DENIES Plaintiffs’ motion with respect to their assertion that the crime-fraud exception vitiates
20 the attorney-client privilege.

21 //

22
23 ³ Plaintiffs also argue that the attorney-client privilege has been waived with respect to Privilege
24 Log Entries 35, 36, and 41 because Mr. Chen’s legal advice was disclosed to third parties. (Dkt.
25 No. 65 at 5–6.) If all recipients, authors, and copied parties of and on these emails were Starfish
26 board members at the time the email was sent, the privilege has not been waived. But if any mid-
level or lower-level employees are included on these emails, Defendant Bosmann is ORDERED
to indicate such on his production of those entries, so that the Court can determine whether the
privilege has been waived for that independent reason. *See supra*, Section 2.C.1.i.

1 2. Work Product Doctrine

2 Defendant Bosmann asserts that Privilege Log Entries 26–29, 43–47, 57–58, and 64–66
3 are protected by the work product doctrine. (Dkt. No. 65-2 at 16–28.) The work product doctrine
4 states that “a party may not discover documents and tangible things that are prepared in
5 anticipation of litigation or for trial by or for another party or its representative” Fed. R.
6 Civ. P. 26(b)(3)(A). It protects not only an attorney’s own work, but also materials prepared *on*
7 *behalf of* the attorney. See *United States v. Nobles*, 422 U.S. 225, 238–39, 239 n.13 (1975).

8 The rule does not shield all documents relating to a case. Instead, it applies only to
9 documents prepared in anticipation of litigation or for trial. Fed. R. Civ. P. 26(b)(3). To
10 determine whether a document was prepared “in anticipation of litigation,” courts examine the
11 totality of the circumstances surrounding the document to evaluate whether it was created
12 “because of” the threat of litigation. *In re Grand Jury Subpoena*, 357 F.3d 900, 907–08 (9th Cir.
13 2004). The inquiry focuses on whether the “document was created because of anticipated
14 litigation, and would not have been created in substantially similar form but for the prospect of
15 litigation.” *Id.* at 908 (citing *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998)). The
16 party asserting the privilege must show that the “threat of litigation was impending.” *Johnson v.*
17 *Allstate Prop. & Cas. Ins. Co.*, Case No. C14-5064-KLS, Dkt. No. 41 at 10 (W.D. Wash. 2014).

18 Even if documents are protected by the work product doctrine, they are still discoverable
19 if a party can show that it “has substantial need for the materials to prepare its case and cannot,
20 without undue hardship, obtain their substantial equivalent by another means.” Fed. R. Civ. P.
21 26(b)(3)(A)(ii).

22 *i. Privilege Log Entries 26–29 and 64–66*

23 Plaintiffs argue that these entries are not protected by the work product doctrine because
24 they are communications between Defendant Bosmann and a non-attorney third party. (Dkt. No.
25 65 at 14–15.) However, the fact that these documents were prepared at the direction of the
26 attorney, instead of with the attorney present, makes no difference as to whether the documents

1 are protected. *See Nobles*, 422 U.S. at 238–39, 239 n.13. And the timing of the communications
2 reinforces that these documents were made in anticipation of the present litigation. (*See* Dkt. No.
3 65-2 at 3–4, 16–28.) All of these communications were made either: (1) after the New York
4 litigation had been dismissed, but when the Plaintiffs anticipated that a new lawsuit would soon
5 be filed; or (2) after the commencement of the instant litigation. (Dkt. Nos. 65-1 at 14–16, 26;
6 65-2 at 3–4, 16–28.) As long as the documents are prepared in anticipation of litigation or for
7 trial and are prepared by or for the party seeking the protection, the documents are subject to the
8 protection of the work product doctrine. *See In re Grand Jury Subpoena*, 357 F.3d at 907–08.
9 Therefore, Privilege Log Entries 26–29 and 64–66 are protected by the work product doctrine.

10 Thus, Plaintiffs may only compel production of these documents if they can show that
11 they have a substantial need for the materials to prepare their case and cannot, without undue
12 hardship, obtain their substantial equivalent by other means. *See* Fed. R. Civ. P. 26(b)(3)(A)(ii).
13 Plaintiffs have not met this burden: they have asserted no substantial need for these materials and
14 no undue hardship that would occur by obtaining the materials through other means. Therefore,
15 Plaintiffs’ motion to compel *in camera* review of Privilege Log Entries 26–29 and 64–66 is
16 DENIED.

17 ii. *Privilege Log Entries 43–47 and 57–58*

18 Plaintiffs argue that these entries are not protected by the work product doctrine because
19 they are communications between Defendant Bosmann and a non-attorney third party and
20 because the communications took place before Defendant Bosmann received a litigation hold
21 letter from Plaintiffs’ counsel. (Dkt. No. 65 at 13.) Defendant Bosmann responds that the
22 communications were made in anticipation of litigation because the communications were made
23 after Plaintiff Amy Meeker informed Defendant Bosmann that her “agency is aware of what is
24 going on and it has been suggested that we make a formal complaint.” (*Id.* at 16.) Plaintiff Amy
25 Meeker’s statement is taken out of context. Immediately after that statement, she says: “[t]his is
26 something I would never do because I know it would take away from children who are b[e]ing

1 helped by Starfish.” (Dkt. No. 65-1 at 40.) Therefore, given the totality of the circumstances, this
2 statement would not likely lead Defendant Bosmann to the conclusion that litigation was
3 impending. Privilege Log Entries 43–47 and 57–58 were all made between Plaintiff Amy
4 Meeker’s statement (made July 21, 2015) and the date that the litigation hold letter was received
5 by Defendant Bosmann (November 2015), which would have certainly put Defendant Bosmann
6 on notice that litigation was impending. (Dkt. No. 65-1 at 19–23, 40.) Because Plaintiff Amy
7 Meeker’s statement alone would not likely have put Defendant Bosmann on notice that litigation
8 was impending, Defendant Bosmann has not met his burden of showing that these documents
9 were made in anticipation of litigation. Therefore, the Court ORDERS Defendant Bosmann to
10 produce Privilege Log Entries 43–47 and 57–58 for *in camera* review. If the Court determines
11 that the entries are protected by the work product doctrine, Plaintiffs will be required to show
12 that they have a substantial need for these materials to prepare their case and that they cannot,
13 without undue hardship, obtain their substantial equivalent by other means. *See* Fed. R. Civ. P.
14 26(b)(3)(A)(ii).

15 **III. CONCLUSION**

16 For the foregoing reasons, the Court ORDERS that:

- 17 1. No later than 14 days after the Court enters this order, the parties shall submit a
18 revised stipulated protective order that covers the medical history and information for
19 each of Plaintiffs’ adopted children other than C.M.;
- 20 2. No later than 7 days after the Court enters the parties’ stipulated protective order,
21 Plaintiffs shall produce, whether in the form of deposition testimony or a response to
22 an interrogatory, the following information about each of Plaintiffs’ other adopted
23 children: (1) medical diagnoses (except mental health diagnoses); (2) treatments
24 related to the aforementioned diagnoses; (3) prognoses; (4) a typical week of care for
25 each child (including schedule and cost); and (5) any special care each child needs
26 over the course of a longer period of time (including schedule and cost);

- 1 3. No later than 14 days after the Court enters this order, Defendant Bosmann shall
2 produce Privilege Log Entries 6, 31, 33–39, 41, 43–47, and 57–58 for *in camera*
3 review;
- 4 a. If any mid-level or lower-level employees are included on the emails in
5 Privilege Log Entries 35, 36, and 41, Defendant Bosmann shall indicate that
6 on his production of those entries, so that the Court can determine whether the
7 privilege has been waived for an independent reason;
- 8 4. No later than 14 days after the Court enters this order, if any mid-level or lower-level
9 employees were included on the email in Privilege Log Entry 21, Defendant
10 Bosmann shall produce that entry for *in camera* review;
- 11 5. If, after reviewing this order and Privilege Log Entries 6, 21, 31, 33–39, 41, 43–47,
12 and 57–58, Defendant Bosmann concludes that the attorney-client privilege and the
13 work product doctrine are indeed inapplicable, he may produce those documents to
14 Plaintiffs in lieu of providing them to the Court for *in camera* review. If Defendant
15 Bosmann chooses this option, he is ORDERED to file a short declaration with the
16 Court confirming his production of those privilege log entries.
- 17 6. The parties shall meet and confer before filing any future discovery motions.

18 DATED this 16th day of May 2019.

19
20
21 

22 John C. Coughenour
23 UNITED STATES DISTRICT JUDGE
24
25
26